Supreme Court, U.S.
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In The

Supreme Court of the United States

WARD S. LARKIN,

Petitioner,

vs.

MICHAEL JOHNSON and COMPUSA, Inc.,

Respondents.

On Petition For Writ Of Certiorari To the Texas Court Of Appeals For The Fourteenth Judicial District Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

While off-duty working as a security guard for Respondent CompUSA, Inc., Respondent Harris County Deputy Sheriff Michael Johnson arrested Petitioner Ward S. Larkin. Larkin sued Respondents for damages alleging false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress. The Texas courts granted Respondents summary judgment from trial on the grounds that Johnson acted as a Texas peace officer when he arrested Larkin, and that he was entitled to qualified official immunity. The question is whether the Texas courts misapplied the Fighting Words Doctrine from *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), and related U.S. Supreme Court decisions, by holding that "What the hell are you doing?" are fighting words.

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CITATION OF LOWER COURT OPINION

Larkin v. Johnson, 44 S.W.3d 188 (Tex. App. – Houston [14th Dist.] 2001, pet. denied) [App. 1-5]

BASIS FOR JURISDICTION

Pursuant to 28 U.S.C. § 1257(a), the Supreme Court has jurisdiction of this matter because Petitioner seeks enforcement of his rights and privileges under the Constitution of the United States of America. Review on a writ of certiorari is appropriate because the Texas court of appeals has decided an important federal question in a way that conflicts with relevant decisions by this Court.

This petition is filed within 90 days after the Texas Supreme Court's September 27, 2001 decision overruling Petitioner's motion for rehearing from denial of petition for review. [App. 12]

The 133rd Texas District Court granted final summary judgment on April 9, 1998 [App. 7 and App. 8], and denied Petitioner's motion for new trial on June 15, 1998. [App. 14] The 14th Texas Court of Appeals rendered judgment [App. 6] and issued an opinion [App. 1-5] on March 22, 2001. The court of appeals overruled Petitioner's motion for rehearing on April 26, 2001. [App. 9] The Supreme Court of Texas denied Petitioner's Petition for Review on August 9, 2001 [App. 10-11], and denied his motion for rehearing on September 27, 2001. [App. 12]

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Const., amend I:

> Congress shall make no law . . . abridging the freedom of speech, ...

2. U.S. Const., amend. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. U.S. Const., amend. XIV, § 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 17, 1996 at approximately 7:30 p.m., Petitioner Ward Larkin went to Respondent CompUSA's store at 330 F.M. Road 1960 in Harris County, Texas to buy a mouse for his computer. After he paid for the item the checkout clerk told him to show his receipt to the man at the door. (Trial Clerk's Record (CR) Page 199.) This was Michael Johnson, a uniformed off-duty Harris County deputy sheriff working for CompUSA as a security guard

with the approval of the Harris County Sheriff's Department. (CR 162, 165) Johnson was stationed inside the store a few feet from the exit. (CR 168) His job was to stop each customer leaving the store to make sure that his or her receipt matched the purchased merchandise. (CR 164)

Larkin walked up to Johnson and held his receipt up just below Johnson's eye level. (CR 199) Johnson did not identify himself, ask to see Larkin's receipt, or ask to see Larkin's purchase.[1] (CR 211) Without consent Johnson tried to take Larkin's receipt. Simultaneously, and also without consent, Johnson marked on the receipt with a highlighter pen. Surprised, Larkin pulled the receipt away from Johnson, took a step back and asked, "What the hell are you doing?" (CR 199) Larkin's tone of voice was slightly louder than conversational. (CR 214) Johnson testified in his deposition that neither he nor anyone else in the store was incited to breaching the peace. (CR 177)

After Johnson forcibly marked on and tried to take Larkin's receipt, Johnson politely explained that he was checking the receipts to prevent theft. Larkin said "Oh, OK", then turned from Johnson and walked to the exit. Larkin entered the vestibule to CompUSA's store when Johnson called from behind: "What did you say back there? Do you know that it's against the law to use foul and abusive language with a peace officer?"[2] Larkin

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[1] Johnson claims that he did ask permission to see Larkin's receipt. (CR 152)

[2] There is no Texas statute that expressly prohibits foul and abusive language with a peace officer, and Johnson admitted in deposition that he knows there is no such law. (CR 171)

stopped in the vestibule, turned and faced Johnson. Johnson had also entered the vestibule. Larkin explained that he was surprised by and didn't understand why Johnson marked on and tried to take his receipt. Then Larkin said, "You marked my receipt. Everything's OK. I'm in a hurry. I've got to go." Larkin turned and walked outside onto the sidewalk. Johnson again called Larkin from behind. Larkin stopped on the sidewalk, turned and faced Johnson. Johnson had followed Larkin onto the sidewalk. Johnson identified himself as a Harris County deputy sheriff, and Larkin said, "I'm in a hurry. I've got to go." Larkin turned and walked about 20 feet into the parking lot. Johnson stayed on the sidewalk. Johnson called Larkin again: "I'm a Harris County deputy sheriff, and I order you to come back here." Larkin stopped, turned, faced Johnson and said, "If you want me to stay here, then you will have to arrest me." Larkin turned and walked away. When Larkin reached his car Johnson arrested him, stating "you are under arrest for using foul and abusive language with a peace officer and for evading detention." Larkin was handcuffed and escorted back into CompUSA to an office in the back of the store where Johnson telephoned the Harris County Sheriff's Department. (This whole paragraph is from CR 200-201.)

Larkin was transported to the Harris County Jail and was held in custody until the next morning when he appeared before a magistrate. Larkin was charged with the offense of evading detention under *Tex. Penal Code Ann.*, 38.04(a) ("a person commits an offense if he intentionally flees from a person he knows is a peace officer attempting lawfully to arrest or detain him.") Bond was set at $500, posted and Larkin was released. (CR 201-2)

On September 25, 1996, at his initial appearance before the Harris County Criminal Court at Law No. 6, the charges against Larkin were dismissed for insufficient evidence. (CR 4)

Represented by counsel, Larkin filed suit in the 133rd Texas State District Court against CompUSA, Inc. and Michael Johnson alleging "false arrest, false imprisonment, battery, malicious prosecution, and intentional infliction of emotional distress." (CR 3) In Larkin's response to Johnson and CompUSA's motions for summary judgment Larkin raised the federal question of Freedom of Speech under the Fighting Words Doctrine.

> Whether particular words are fighting words is a question of fact. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573, 62 S.Ct. 766, 770, 86 L.Ed. 1031 (1942); OP. TEX. ATTY. GEN., JM-900 (1988) [See App. 15-18]. The test is what a person of common intelligence would understand to be words likely to cause an average addressee to fight. *Gooding v. Wilson*, 405 U.S. 581 (sic), 523, 92 S.Ct. 1103, 1106, 31 L.Ed.2d 408 (1972); OP. TEX. ATTY. GEN., JM-900. [See App. 15-18] Speech punishable under [*Tex. Penal Code Ann.*] Section 42.01 does not include language that is merely harsh and insulting. *Gooding*, 504 (sic) U.S. at 525, 92 S.Ct. at 1107. Derisive and annoying words can be taken as coming within the purview of the statute only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. *Gooding*, 504 (sic) U.S. at 522, 92 S.Ct. at 1106. (CR 223)

Larkin also raised the specific issue of his right to Freedom of Speech: "[w]hether Plaintiff committed the

crime of disorderly conduct or was exercising his right to Free Speech is a fact question in dispute." (CR 228)

The district court granted summary judgment to CompUSA [App. 7] and Johnson. [App. 8] Judgment became final on April 9, 1998. Represented by the same counsel, Larkin filed a timely motion for a new trial, raising the exact same Fighting Words Doctrine argument. Larkin also made clear that the Texas courts have ruled that "*Tex. Penal Code Ann.* § 42.01(a)(1) . . . applies only to 'fighting words' which by their very utterance tend to incite an immediate breach of the peace. *Jimmerson v. State*, 561 S.W.2d 5, 7 (Tex. Crim. App. 1978)." (CR 262-63) The district court denied Larkin's motion for a new trial on June 15, 1998. [App. 14]

Represented by the same counsel as at trial court, Larkin filed an appeal to the 14th Texas Court of Appeals. Larkin was allowed to file this appeal out-of-time. Larkin raised word-for-word the same Fighting Words Doctrine argument as he did at trial court in his response to Respondents' motions for summary judgment. On March 22, 2001 the court of appeals denied Larkin's appeal, affirming judgment of the trial court, [App. 6] and issued its opinion. [App. 1-5] The court of appeals acknowledged that Larkin had made a Freedom of Speech claim – "Larkin contends summary judgment was unwarranted because Johnson maliciously arrested him for what Larkin said as he left the CompUSA store where the deputy worked an off-duty job." [App. 1] – but the court of appeals did not otherwise address it.

Acting on his own behalf, Larkin filed a timely motion for rehearing with the court of appeals, and

argued that the court did not properly apply the analysis of this Court's ruling in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) or *Gooding v. Wilson*, 405 U.S. 518 (1972).

> The court did not properly measure [Larkin's] conduct against the accepted standard objective reasonableness of landmark U.S. Supreme Court cases *Chaplinsky v. New Hampshire*, 315 U.S. 568, and *Gooding* [*v. Wilson*, 405 U.S. 518 (1972)], and Texas Attorney General Opinion No. JM-900. [App. 15-18] Against these accepted objective standards of what conduct constitutes disorderly conduct under Penal Code 42.01(a)(1), saying "What the hell are you doing?" in a slightly louder than conversational tone of voice doesn't even register a blip on the meter. (Larkin's Motion for Rehearing, pg. 6)

The court of appeals overruled Larkin's motion for rehearing on April 26, 2001. [App. 9] Acting on his own behalf, Larkin filed a timely Petition for Review with the Supreme Court of Texas, arguing that the lower courts misapplied this Court's ruling in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) and *Gooding v. Wilson*, 405 U.S. 518 (1972).

> To support his argument that "What the hell are you doing?" is not language which violates *Disorderly Conduct*, Larkin uses the objective legal reasonableness of *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), *Gooding v. Wilson*, 405 U.S. 518 (1972) and *Texas Attorney General Opinion JM-900*. [See App. 15-18]. (Larkin's Petition for Review, pg. 3)

and,

> Texas courts have uniformly held that TPC [*Tex. Penal Code Ann.*,] § 42.01(a)(1) applies to "fighting words", words that "by their very utterance tend to incite an immediate breach of the peace." *Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied) citing *Chaplinksy v. New Hampshire*, 315 U.S. 568. The concept of "breach of the peace" includes actual or threatened violence as an essential element, *Woods v. State*, 152 Tex. Crim. 338, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). Speech that is merely harsh and insulting is not punishable. *Gooding v. Wilson*, 405 U.S. 518, 525 (1972). (Larkin's Petition for Review, pg. 7)

The Supreme Court of Texas denied Larkin's Petition for Review on August 9, 2001. [App. 10-11] Acting on his own behalf, Larkin filed a timely motion for rehearing. The Supreme Court of Texas denied Larkin's motion for rehearing on September 27, 2001. [App. 12-13]

SUMMARY OF ARGUMENT

Instead of applying the analysis mandated by this Court's precedents on fighting words, the Texas court of appeals ignored them. The opinion of the Texas court of appeals did not address the Fighting Words Doctrine whatsoever. By affirming summary judgment the Texas court of appeals held, by default, that Johnson had probable cause to arrest Larkin, reasonable suspicion to detain him, and, because Johnson offered no other objective justification for Larkin's detention, that "What the hell are you doing?" is criminal activity, specifically fighting words.

This case turns on whether "What the hell are you doing?" are fighting words. It is the central, supporting and cohesive element of this whole case. For if "What the hell are you doing?" are not fighting words, then the subsequent conclusions of law and judgments of law topple one after the other. Specifically, "What the hell are you doing?" are not fighting words; so there's no reasonable suspicion to detain Larkin for disorderly conduct; so there's no probable cause to arrest Larkin for evading detention; so Johnson didn't act in good faith when he arrested Larkin; so Johnson wasn't entitled to qualified official immunity; and finally the Texas trial court was in error to grant Johnson, and consequently CompUSA, summary judgment from Larkin's suit for damages. Larkin's Constitutional right to equal protection of the laws was violated, and in turn he was deprived of his day in court.

ARGUMENT

This is an appeal from summary judgment. In reviewing summary judgment the Texas courts must take all evidence favorable to the non-movant (Larkin) as true, resolving all doubts and indulging all reasonable inferences in the non-movant's favor. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). More importantly, the Texas court of appeals doesn't address the elements of Larkin's arrest. There's no analysis of fighting words, disorderly conduct, or evading detention, even though Larkin raised each of those issues at every level with the Texas courts. In fact, its opinion doesn't even mention the crime for which Larkin was arrested:

"As Larkin started to get in his car, Johnson arrested him." Larkin's sole issue on appeal before the 14th Texas Court of Appeals was that "the trial court erred in granting summary judgment for both defendants". The Supreme Court of Texas has ruled that such language preserves all possible grounds upon which summary judgment should have been denied. *See Plexchem International, Inc. v. Harris County Appraisal District*, 922 S.W.2d 930, 930-31 (Tex. 1996).

It appears that the justification by the Texas court of appeals for its silence on the issues of fighting words, disorderly conduct, and evading detention is provided by the second to last sentence of its opinion: "[The doctrine of qualified governmental immunity] renders facts relating only to the substantive causes of action immaterial." But one of the tests on qualified governmental immunity is objective legal reasonableness. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 657 (Tex. 1994) (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), regarding the standard of review for objective legal reasonableness: the plaintiff must produce evidence that "no reasonable person in the defendant's position could have thought the facts were such that they justified the defendant's acts.")

The Texas court of appeals' refusal to reveal its reasoning confuses and frustrates Larkin much the way the Cheshire Cat did Alice when she asked for directions in Wonderland.

> "In THAT direction," the Cat said, waving its right paw around, "lives a Hatter: and in THAT direction," waving the other paw, "lives a

March Hare. Visit either you like: they're both mad."

"But I don't want to go among mad people," Alice remarked.

"Oh you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad."

"How do you know that I'm mad?" said Alice.

"You must be," said the Cat, "or you wouldn't have come here."

Alice didn't think that proved it at all . . . .

(L. Carroll, Alice's Adventures in Wonderland, p. 104, Candlewick Press, 1999).

Exactly, that didn't prove it at all, for the question Larkin presents to this Court is one of First Amendment Freedom of Speech, applicable to the State of Texas by the Fourteenth Amendment. This case involves conclusions of law that are implicitly inseparable from the findings of fact. Thus, the U.S. Supreme Court must "independently review the factual record to ensure that the state court's judgment does not unlawfully intrude on free expression. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 at 567-568 (1995)." *BSA v. Dale*, 530 U.S. 640, 648 (2000). The U.S. Supreme Court must assure itself that the judgment of the Texas court of appeals "does not constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964).

1. "What the hell are you doing?" are not fighting words.

"There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include . . . 'fighting' words – those which by their very utterance inflict injury or tend to incite an immediate breach of the peace . . . . 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' *Cantwell v. Connecticut,* 310 U.S. 296, 309-310." *Chaplinisky v. New Hampshire,* 315 U.S. 568, 571-72 (1942).

Fighting words are " 'what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace. . . . . ' *91 N. H. 310, 313, 320-321, 18 A. 2d 754, 758, 762 (1941).*" *Gooding v. Wilson,* 405 U.S. 518, 523 (1972).

" 'The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee. . . . ' " *Id.*

Proscribed speech must be "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California, 403 U.S. 15, 20.* Additionally, the offensive words must be

"directed to the person of the hearer." *Id.*, quoting *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

In sum, to be fighting words the expression spoken must (1) constitute a personally abusive epithet (2) addressed in a face-to-face manner (3) directly to the person of the hearer and, (4) as a matter of common knowledge, be inherently likely to provoke an immediate violent response by an average addressee. If any of these elements is missing, then the Fighting Words Doctrine doesn't apply for the purpose of punishing that expression.

Because this case also involves speech directed to a police officer, *Hill v. City of Houston*, 482 U.S. 451, 462 (1987), is especially important:

> "Moreover, in a concurring opinion in *Lewis [v. City of New Orleans*, 415 U.S. 130 (1974)], JUSTICE POWELL suggested that even the "fighting words" exception recognized in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), might require a narrower application in cases involving words addressed to a police officer, because "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.' " 415 U.S. at 135."

Regarding the facts of this case, Larkin did speak directly to Johnson in a face-to-face manner, but those are the only elements of fighting words that Larkin's "what the hell are you doing?" utterance met. "What the hell are you doing?" does not constitute a personally abusive epithet, nor is it language that is inherently likely to

cause an immediate violent response, particularly from a properly trained police officer. Larkin asked one single question to Johnson, acknowledged Johnson's answer, then walked away. Larkin was not hurling abuse at Johnson in a persistent manner. The Supreme Court of Pennsylvania held in *Pennsylvania v. Hock*, 556 Pa. 409, 416 (Pa. 1999), that a single profane remark (specifically, "F you, a .") spoken in a normal tone of voice directed to a police officer does not constitute fighting words.

In many ways *Pennsylvania v. Hock*, 556 Pa. 409 (Pa. 1999) is similar to this case. Ms. Hock was questioned by a police officer on suspicion of a traffic violation. She made her profane remark as she walked away from the officer. The officer pursued Ms. Hock and advised her that she was under arrest for disorderly conduct. The disorderly conduct statute in Pennsylvania is also based on the Fighting Words Doctrine. As the officer placed handcuffs on Ms. Hock, she shouted protestations and then kicked the officer several times. Hock was charged with disorderly conduct and resisting arrest. The Supreme Court of Pennsylvania held that Ms. Hock's remark didn't constitute fighting words, therefore the officer didn't have probable cause to arrest her. Also, since Ms. Hock wasn't lawfully under arrest, she couldn't have committed the offense of resisting arrest.

Especially compelling is the Supreme Court of Pennsylvania's caution against police abuse of the disorderly conduct statute:

> "Moreover, the offense of disorderly conduct is not intended as a catchall for every act which annoys or disturbs people; it is not to be used as a dragnet for all the irritations which breed in

> the ferment of a community. It has a specific purpose; it has a definite objective, it is intended to preserve the public peace; it has thus a limited periphery beyond which the prosecuting authorities have no right to transgress any more than the alleged criminal has the right to operate within its clearly outlined circumference." *Pennsylvania v. Hock*, 556 Pa. 409, 418 (Pa. 1999).

In deciding whether words are fighting words, "the circumstances surrounding the words can be crucial, for only against the background of surrounding events can a judgment be made whether [the] words had 'a direct tendency to cause acts of violence' by [the addressee]." *Lamar v. Banks*, 684 F.2d 714, 719 (11th Cir. 1982). Also, *see Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring) (observing that "words may or may not be 'fighting words' depending upon the circumstances of their utterance").

Johnson had just forcibly marked on and tried to take Larkin's receipt. Larkin had the right to protect his property under *Tex. Penal Code Ann.* § 9.41(a): "A person in lawful possession of . . . tangible, movable property is justified in using force against another to the degree the actor reasonably believes that the force is immediately necessary to . . . terminate the other's . . . unlawful interference with the property." Larkin was also protected from Johnson marking on his receipt without consent. *Tex. Penal Code Ann.* § 28.03(a)(3) provides that "a person commits an offense if, without the effective consent of the owner, he intentionally or knowingly makes markings . . . on the tangible property of the owner." Additionally, the Texas court of appeals appears to say that Larkin was in the wrong for not freely releasing his

receipt: "Johnson was marking receipts at CompUSA as a security guard when Larkin, a customer leaving with merchandise, resisted releasing his receipt." [App. 1-2]

Possibly some find the word "hell" offensive. However, as Larkin used it, the American Heritage Dictionary of the English Language, Third Edition, 1992 defines "hell" as "*Informal*, Used as an intensive". This is word-for-word synonymous with such innocent words and terms as "devil", "deuce", "dickens" and "in the world". Not even the most grammatically squeamish would find "What in the world are you doing?" personally abusive, by its very utterance likely to cause an immediate violent response. Synonymously, only the supersensitive would find "What the hell are you doing?" personally abusive, likely to cause an immediate violent response by the average addressee. "What the hell are you doing?" spoken in the circumstances in which Larkin uttered it, are not fighting words.

2. Respondent Deputy Johnson did not have reasonable suspicion under the Fourth Amendment to detain Petitioner Larkin for disorderly conduct.

There are two ways to examine this issue. Either the issue is moot because the proper standard of review is whether Johnson had probable cause to arrest Larkin without a warrant, or, if reasonable suspicion is the proper standard of review, then whether Johnson had sufficient objective reasonableness for an investigative stop on suspicion of disorderly conduct.

One, Johnson testified in deposition (CR 177) and on affidavit (CR 153) that he attempted an investigative stop

of Larkin for the offense of disorderly conduct. But, Johnson knew all of the facts prior to the stop; further investigation would reveal nothing. Either Larkin had committed disorderly conduct beforehand, or he had not. Therefore, the issue is whether Johnson had probable cause to arrest Larkin without a warrant, not whether Johnson had reasonable suspicion to attempt an investigative stop. *See Texas v. Rivenburgh*, 933 S.W.2d 698, 700-701 (Tex. App. San Antonio 1996, no pet.) (citing *Whren v. United States*, 517 U.S. 806, 816-19 (1996) ("issue where stop followed observed traffic violation was whether probable cause existed").)

Two, to justify an investigative stop an officer must have specific articulable facts, taken in light of his or her experience and general knowledge together with rational inferences from those facts, that would reasonably warrant the intrusion. *See Terry v. Ohio*, 392 U.S. 1, 21-22 (1968). "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio*, 392 U.S., at 32-33 (Harlan, J., concurring); *id.*, at 34 (WHITE, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds." *Florida v. Royer*, 460 U.S. 491, 497-498 (1983). Ultimately, to justify any detention there must be reasonable suspicion that criminal activity is afoot. *See Brown v. Texas*, 443 U.S. 47, 51 (1979).

The offense of disorderly conduct under *Tex. Penal Code Ann.* § 42.01(a)(1) is committed when a person intentionally or knowingly uses abusive, indecent, profane, or

vulgar language in a public place, and the language by its very utterance tends to incite an immediate breach of the peace. The Texas courts have ruled that *Tex. Penal Code Ann.* § 42.01(a)(1) applies only to "fighting words" which by their very utterance tend to incite an immediate breach of the peace as required by *Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 1031, 62 S. Ct. 766 (1942). *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.) (Section 42.01(a)(1) applies only to "fighting words" and is not unconstitutionally vague). *See Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied). This was also Texas's legislative intent: "The 'practice commentary' in the annotated Code confirms that this section is designed to track the 'fighting words' exception set forth in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). *Tex. Penal Code Ann.* § 42.01, pp. 124-125 (1974 and Supp. 1987)." *Hill v. Houston*, 482 U.S. 451, 463 (Fn. 10) (1987).

Even though this is an appeal from summary judgment and the courts are required to view the evidence in a light favorable to Larkin, there is no substantive dispute on the record as to what happened immediately after Johnson marked on and tried to take Larkin's receipt. Larkin testified in deposition that he "pulled the receipt back, and asked [Johnson] 'What the hell are you doing?' " (CR 199) Johnson swore in his affidavit that Larkin "grabbed the receipt from my hand and stated 'What the hell are you doing, that's my receipt!' " (CR 152) Larkin and Johnson also agree that Johnson immediately explained why he was checking the receipt, and afterwards that Larkin walked away toward the exit. (CR 200 and CR 152, 171, respectively)

Johnson swore in his affidavit that he decided to detain Larkin for disorderly conduct under *Tex. Penal Code Ann.* § 42.01(a)(1). (CR 153) His justification to detain Larkin was because (1) Larkin's "actions were highly unusual", (2) Larkin's "actions toward me caused me to be alarmed and concerned as to his immediate, past or future actions", (3) and Johnson "needed to maintain control over the situation in order to protect the safety of the individuals in the area". (CR 152-154) First, *Tex. Penal Code Ann.* § 42.01(a)(1) only applies to speech. It doesn't apply to physical conduct. Johnson's use of the word "action" applies only to Larkin having said, "What the hell are you doing?" Second, with nothing more, highly unusual speech is not an element of disorderly conduct. Third, there is a crisp and bright distinction between speech causing alarm and speech having a direct tendency to cause immediate violent response. More importantly, there's evidence that Johnson wasn't alarmed. Larkin gave deposition testimony that Johnson's response to "What the hell are you doing?" was polite and reasonable. (CR 200) Fourth, Johnson was being disingenuous by implying that there was a breach of the peace at the time. He gave deposition testimony that he did not see Larkin's behavior incite anyone to breaching the peace. (CR 177) Thus, Johnson provided no specific articulable facts to support reasonable, objective grounds to detain Larkin for suspicion of disorderly conduct. Thus, Johnson did not have reasonable suspicion to detain Larkin for disorderly conduct.

Additionally, the opinion by the Texas court of appeals appears to allow police officers their own discretion to decide what speech constitutes fighting words.

The opinion states that "Johnson followed [Larkin] outside, and attempted an investigative stop for suspicion of disturbing the peace." But disturbing the peace is not defined as an offense in Texas, nor is it an element of an offense. Disturbing the peace was a statute in Texas – Title 9, Chapter 3, Article 474 – but it was amended and renamed disorderly conduct by Texas Act of June 10, 1969, 61st Leg., p. 1510, ch. 454, § 1, eff. June 10, 1969. Then it was repealed by Texas Acts of 1973, 63rd Leg., p. 883, ch. 399, § 1, eff. January 1, 1974. Because disturbing the peace is not an offense, it can not be lawful justification to detain someone. *Brown v. Texas*, 443 U.S. 47, 51 (1979), (Police officers must "have a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.") Not only does the opinion by the Texas court of appeals give the police authority to detain persons for non-criminal activity (that is, disturbing the peace), it leaves the definition of disturbing the peace up to individual officers' personal and subjective initiative.

3. Respondent Deputy Johnson did not have probable cause under the Fourth Amendment to arrest Petitioner Larkin for disorderly conduct or evading detention.

As shown in section 2 above, Johnson didn't have reasonable suspicion to detain Larkin for disorderly conduct. Also, reasonable suspicion is a less demanding standard than probable cause. *See Alabama v. White*, 496 U.S. 325, 330 (1990). Therefore, since Johnson didn't have the lower standard of reasonable suspicion to detain Larkin for disorderly conduct, Johnson can't have higher standard of probable cause.

Evading detention under *Tex. Penal Code Ann.*, § 38.04(a) is committed when a person intentionally flees from a person he or she knows is a peace officer attempting lawfully to arrest or detain him or her. Thus, a valid charge for evading detention requires underlying lawful detention, which in turn requires that the arresting officer have reasonable suspicion that criminal activity is afoot. *See Brown v. Texas*, 443 U.S. 47, 51 (1979). In this case Johnson's reasonable suspicion to detain Larkin was predicated upon disorderly conduct under *Tex. Penal Code Ann.*, § 42.01(a)(1), which the Texas courts have ruled only applies to fighting words. *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.) (Section 42.01(a)(1) applies only to "fighting words" and is not unconstitutionally vague); *See Duran v. Furr's Supermarkets, Inc.*, 921 S.W.2d 778, 785 (Tex. App. – El Paso 1996, writ denied).

A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. Tex. Code Crim. Proc. Ann. art. 14.01(b). Probable cause which will justify an arrest without a warrant by police officers exists where the facts and the circumstances within the officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Dunaway v. New York*, 442 U.S. 200, 208 (1979).

"What the hell are you doing?" are not fighting words, as shown in section 1, and disorderly conduct under *Tex. Penal Code Ann.*, § 42.01(a)(1) only applies to fighting words, *Ross v. State*, 802 S.W.2d 308, 314-15 (Tex.App. – Dallas 1990, no pet.), thus "What the hell are

you doing?" is not speech that constitutes the offense of disorderly conduct. Johnson provided no more objective reasonableness to detain Larkin for suspicion of disorderly conduct than Larkin having said "What the hell are you doing?", thus Johnson did not have the lawful authority to detain Larkin for suspicion of disorderly conduct. *Florida v. Royer*, 460 U.S. 491, 498 (1983) (an individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.") Since Johnson did not have the lawful authority to detain Larkin, a predicate element of evading detention, the circumstances within Johnson's knowledge were not sufficient to warrant a prudent officer to believe that Larkin had committed the offense of evading detention. Thus, Johnson did not have probable cause to arrest Larkin for evading detention.

4. Respondent Deputy Johnson was not entitled to Qualified Official Immunity.

Under Texas law, a defendant seeking a summary judgment on an affirmative defense of immunity must prove, without dispute and as a matter of law, that when the event in question occurred, he or she was: (1) performing a discretionary function, (2) acting in good faith, and (3) acting within the scope of their authority. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). This is correctly stated and cited of the opinion of the Texas court of appeals. [App. 4]

Also, when a trial court's order does not specify the grounds relied on for its ruling, as in this case, the

summary judgment will be affirmed if any of the theories advanced are meritorious. *Insurance Co. of North America v. Security Ins. Co.*, 790 S.W.2d 407, 410 (Tex. App. – Houston [1st Dist.] 1990, no writ). However, this distinction is moot here. Johnson and CompUSA each specified only one ground for summary judgment. Johnson's claim was for qualified official immunity. CompUSA's claim was that once Johnson witnessed Larkin commit a crime, it was no longer liable for Johnson's actions.

The Texas court of appeals correctly held that Johnson's arrest of Larkin was undisputedly discretionary. [App. 4] Whether Johnson acted within the scope of his authority is now moot. It does not comprise a subsidiary question fairly included within this petition's Question Raised. However, whether Johnson acted in good faith when he arrested Larkin for "using foul and abusive language with a peace officer and for evading detention" does go to whether the Texas courts misapplied the Fighting Words Doctrine.

Citing *City of Lancaster v. Chambers*, 883 S.W.2d 650, 656 (Tex.1994), the Texas court of appeals correctly held that a court must measure good faith in official immunity cases against a standard of objective legal reasonableness, regardless of the officer's subjective state of mind. Then the Texas court of appeals incorrectly stated that "the evidence clearly supports the officer's objective legal reasonableness, and the appellant has not controverted it with probative evidence that 'no reasonable person in the defendant's position could have thought that the facts were such that they justified the defendant's acts.' *Chambers*, 883 S.W.2d at 657." No reasonable police officer in Johnson's position is going to think that the facts were

such that they justified Johnson in making an arrest absent probable cause. No reasonable police officer is going to feel justified in arresting someone for disorderly conduct when he or she says, "What the hell are you doing?" This is especially true after provoking the person by trying to take something out of his or her hands without consent.

Included with his motion for summary judgment Johnson presented three expert witness affidavits. One was his own. The others were from Mike Faas, a Harris County Sheriff's Department instructor (CR 146-48), and Scott Durfee, an Assistant Harris County District Attorney. (CR 142-44) All three concluded that Larkin had committed the offenses of disorderly conduct and evading detention. "An expert's testimony will support summary judgment only if it is 'clear, positive and direct, otherwise credible and free from contradictions and inconsistencies, and could have been readily controverted' Tex. R. Civ. P. 166a(c)." *Wadewitz v. Montgomery*, 951 S.W.2d 464, 466 (Tex. 1997). However, instead of presenting credible testimony, all three ignored contradictory evidence and other damaging proof. For example, each incorrectly stated that Larkin was verbally abusive, that his tone of voice was disruptive, and that this created a disturbance. Larkin gave evidence that his tone of voice was "not loud", (CR 214) and Johnson gave evidence that no one in the vicinity was incited to breaching the peace. (CR 177) Thus, all three expert witnesses failed to establish that Johnson acted in good faith when he arrested Larkin because not one of them complied with Tex. R. Civ. P. 166a(c).

More importantly, Mike Faas used evidence that is not on the record. Faas overwhelmingly based his expert witness testimony on the unsubstantiated idea that Larkin had said, "What the hell are you doing, motherfucker?" Similarly, the Texas court of appeals incorrectly states the same idea: "The parties dispute whether Larkin actually did refer to the officer as 'motherfucker'." [App. 2] On the record, however, there is no dispute; Larkin and Johnson agree. Larkin gave deposition testimony that he said, "What the hell are you doing?" (CR 200) Johnson swore under oath on his affidavit that Larkin said, "What the Hell are you doing, that is my receipt!"(CR 152) Johnson swore in his deposition that he could not recall what Larkin said. (CR 167) Johnson based his deposition memory of the incident solely upon reading a copy of his original offense report.[3] (CR 167) However, the offense report itself was not entered into summary judgment evidence. It was only in their unsubstantiated pleadings that Johnson and CompUSA allege that Larkin said, "What the hell are you doing, motherfucker?" (CR 14-15 and CR 156 fn. 1, respectively) Larkin did state in his original pleading that "Johnson . . . accused Plaintiff of saying the word 'motherfucker' ", (CR 3-4) but Larkin admitted no such fact, just that it was Johnson's accusation.

Additionally, lawsuits in Texas alleging false imprisonment, as does this, specifically turn on whether

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[3] The offense report had been expunged and turned over to Larkin. (CR 166-67) During Johnson's deposition Larkin presented the offense report so that Johnson could refresh his memory.

the associated detention was lawful. *See Randall's Food Markets, Inc. v. Johnson*, 891 S.W.2d 640, 644 (Tex. 1995). As shown in section 3 above, Johnson did not have probable cause to arrest Larkin. Johnson's detention of Larkin was unlawful.

In sum, Johnson did not have objective legal reasonableness to demonstrate that he arrested Larkin in good faith, and Johnson's subjective state of mind must be disregarded. Thus, Johnson is not entitled to qualified official immunity.

5. Summary Judgment was granted Respondent Deputy Johnson and Respondent CompUSA in error.

In Texas a movant for summary judgment must show that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law. *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548 (Tex. 1985). In determining whether there is a disputed fact issue precluding summary judgment, the proof must be viewed in a light most favorable to the non-movant (Larkin), resolving all doubts and indulging all reasonable inferences in the non-movant's favor. *Id.* at 548-49.

As shown in section 4, Johnson is not entitled to qualified official immunity from his arrest of Larkin. Whether Johnson acted in good faith when he arrested Larkin is a material fact issue still in dispute. Thus, Johnson is not entitled to summary judgment as a matter of law. The Texas court of appeals was in error to have affirmed the trial court's grant of summary judgment to Respondent Johnson.

CompUSA's motion for summary judgment was based on one claim, essentially expressed in two sentences:

> "The summary judgment record establishes that, when Deputy Johnson observed Mr. Larkin disturbing the peace and evading detention, Deputy Johnson became an on-duty policy (sic) officer and, therefore, not an employee of CompUSA as a matter of law. Plaintiff's sole claim against CompUSA, based on vicarious liability for the acts of Deputy Johnson, therefore fails. *See Leake [v. Half Price Books, Records, Magazines, Inc.]*, 918 S.W.2d at 561-64." (CR 158).

The problem with CompUSA's theory is that its premise is faulty. Larkin didn't commit a crime. Furthermore, at no time did Johnson have the lawful authority to detain Larkin for suspicion of any criminal activity. Thus, there is a material fact issue dispute as to whether Johnson ever assumed his duty as a Texas peace officer, or was instead and at all relevant times an employee of CompUSA. It is, therefore, CompUSA's sole claim for summary judgment that fails.

CONCLUSION

The Texas courts misapplied the analysis mandated by this Court's remarkably consistent precedents on fighting words, and a cascade of erroneous conclusions of law and judgments of law resulted. Ultimately, the Texas courts erred by holding that Johnson and CompUSA were entitled to summary judgment as a matter of law, thereby

violating Larkin's U.S. Constitutional right to equal protection of the laws and depriving him of his day in court. This Court should grant Larkin's petition.

Respectively submitted,

WARD LARKIN
Pro Se Petitioner

15327 Pebble Bend Drive
Houston, TX 77068-1839
Tel.: 281-444-3840
Fax: 281-895-9939

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Affirmed and Opinion filed March 22, 2001.

In The

Fourteenth Court of Appeals of Texas

No. 14-98-00789-CV

Ward S. Larkin, Appellant

v.

Michael Johnson and CompUSA, Inc., Appellee

On Appeal from the 133rd District Court
Harris County, Texas
Trial Court Cause No. 97-30752

OPINION

Harris County Deputy Sheriff Michael Johnson demonstrated with summary judgment proof that qualified official immunity protected him when he arrested the Appellant, Ward S. Larkin, in the parking lot outside a CompUSA. The trial court granted summary judgment. Larkin contends summary judgment was unwarranted because Johnson maliciously arrested him for what Larkin said as he left the CompUSA store where the deputy worked an off-duty job. We find Johnson proved as a matter of law that he acted as a Harris County Deputy Sheriff rather than as an employee of CompUSA. As there is no issue of material fact regarding any element of qualified official immunity, we affirm.

Johnson was marking receipts at CompUSA as a security guard when Larkin, a customer leaving with

merchandise, resisted releasing his receipt. Larkin undisputedly stated, "What the hell are you doing?" The parties dispute whether Larkin actually did refer to the officer as "motherfucker" during this incident. We will assume he did not. Johnson considered Larkin's question as loud. Johnson followed him outside, and attempted an investigative stop for suspicion of disturbing the peace. Johnson clearly identified himself to Larkin as a Harris County Sheriff's Deputy, and ordered him to stop. Larkin refused, stating that if Johnson wanted him to stop, he would have to arrest him. As Larkin started to get in his car, Johnson arrested him.

Larkin argues that Johnson's malice, an element of at least one of the causes of action, arose when Johnson was engaged in the protection of the employer's property. *See Blackwell v. Harris County*, 909 S.W.2d 135, 139 (Tex. App. – Houston [14th Dist.] 1995, writ denied) (quoting *Glenmar Cinestate, Inc. v. Farrell*, 223 Va. 728, 292 S.E.2d 366, 369-70 (1982)). Accordingly, Larkin contends it is a jury question whether Johnson committed the torts as a public officer or as a servant of the employer. However, the comparison of the objective action and actual duty involved, not scienter, determines the immunity question. Notably, *Blackwell* explains that where an officer is performing a job incident to enforcing the public laws, he is acting in the course and scope of his employment as a police officer even if the private employer directed him to perform the duty.

It is undisputed Johnson marked the receipt to protect CompUSA's property while inside the store. However, this duty was complete when Larkin left the store. There is also no contention that, Johnson enforced any

CompUSA policy or advanced CompUSA's interests[1] when he went outside and arrested a paying customer. Thus, there is no issue of material fact about whether Johnson was acting as an employee of the Harris County Sheriff's Office when he arrested a person who refused to comply with the officer's attempt to detain him. *See generally Bridges v. Robinson*, 20 S.W.3d 104, 114 (Tex. App. – Houston [14th Dist.] 2000, no pet. h.) (Finding officers riding hogtied citizen and otherwise abusing him until he died raised a "fact issue" about whether officers working as guards at Dillards were acting in their capacity as peace officers); *Blackwell v. Harris County*, 909 S.W.2d at 139; *City of Dallas v. Half Price Books, Records, Magazines, Inc.*, 883 S.W.2d 374 (Tex. App. – Dallas 1994, no writ) (explaining peace officer becomes a government agent when he begins to function as one). Johnson was acting as an officer, not as an employee of CompUSA when he

---

[1] Larkin attempts to assert fact issues about subjective malice in the context of his underlying false arrest and wrongful prosecution claims. He argues the officer's subjective reasons for behavior presents a jury issue on whether Johnson arrested him out of subjective malice. To the extent Larkin is also arguing anger arising from Johnson's functions for CompUSA prevented Johnson from making the arrest as an officer, we disagree. If Clark Kent is outraged about wrongdoing he discovers while on assignment, his anger is not kryptonite. He is nonetheless Superman as he sallies forth to fight for truth, justice, and the American way. A hero without feeling would be inhuman, not superhuman. From the affidavits of Johnson's superiors, Johnson functioned in all ways as we would expect of a Texas peace officer – even if Larkins' eye could not follow the blinding speed with which Johnson's capacity changed as he passed the door.

arrested the appellant. Accordingly, CompUSA is not liable for Johnson's actions in making the arrest.

Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). The arrest was undisputedly discretionary. The Texas Supreme Court observed in *Chambers* that a court must measure good faith in official immunity cases against a standard of objective legal reasonableness, regardless of the officer's subjective state of mind. 883 S.W.2d at 656. The evidence clearly supports the officer's objective legal reasonableness, and the appellant has not controverted it with probative evidence that "no reasonable person in the defendant's position could have thought that the facts were such that they justified the defendant's acts." *Chambers*, 883 S.W.2d at 657. It is undisputed that the claims arose from Johnson making an arrest and turning the case over to the District Attorney's office. These functions are within the scope of a deputy sheriff's authority. Thus, we do not reach Larkin's causes of action because we conclude Johnson objectively functioned within the aura of the qualified governmental immunity doctrine. This doctrine renders facts relating only to the substantive causes of action immaterial. Accordingly, we affirm.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed March 22, 2001.

Panel consists of Justices Sears, Lee, and Amidei.*

Publish – TEX. R. APP. P. 47.3(b).

---

* Senior Justices Ross A. Sears, Norman Lee, and Former Justices Maurice Amidei sitting by assignment.

March 22, 2001

Judgment

The Fourteenth Court of Appeals of Texas

No. 14-98-00789-CV

Ward S. Larkin, Appellant

v.

Michael Johnson and CompUSA, Inc., Appellee

This cause, an appeal from judgment in favor of appellee, Michael Johnson and CompUSA, Inc., signed April 9, 1998, was heard on the transcript of the record. We have inspected the record and find no error in the judgment. We order the judgment of the court below AFFIRMED.

We order appellant, Ward S. Larkin, to pay all costs incurred in this appeal. We order this decision certified below for observance.

CAUSE NO. 97-30752

WARD S. LARKIN,	§	IN THE DISTRICT
Plaintiff	§	COURT OF
	§	
VS.	§	
	§	HARRIS COUNTY, TEXAS
COMPUSA, INC. and MICHAEL JOHNSON,	§	
	§	
Defendants.	§	133rd JUDICIAL DISTRICT

ORDER

On the 2nd day of March, 1998, came on to be heard the Motion for Summary Judgment of CompUSA, Inc. and the Court, having considered the Motion, any responses thereto, the evidence before it and the pleadings and discovery on file, is of the opinion that this Motion for Summary Judgment is meritorious and should be GRANTED. It is therefore

ORDERED that Plaintiff, Ward S. Larkin, take nothing on his claims against CompUSA, Inc. Costs of court are taxed against Plaintiff.

SIGNED this 25 day of March, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

[97-30752]
NO. ~~672,533~~

WARD LARKIN,	§	IN THE DISTRICT COURT OF
VS.	§	HARRIS COUNTY, TEXAS
MIKE JOHNSON	§	133RD JUDICIAL DISTRICT

ORDER

On ~~this day~~ [March 2, 1998], came on to be heard Defendant, Michael Johnson's Motion for Summary Judgment, and after considering same, it is the opinion of this Honorable Court that said Motion should in all things be **GRANTED** [on March 6, 1998].

SIGNED on this the 9 day of April, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

APPROVED AS TO FORM:

MICHAEL P. FLEMING,
99999939
County Attorney

/s/ Christopher L. Janak
CHRISTOPHER L. JANAK
Assistant County Attorney
1001 Preston, Suite 634
Houston, Texas 77002
(713) 755-4985
(713) 755-8924 Fax

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation, and/or alterations were present at the time of filming.

FOURTEENTH COURT OF APPEALS
[Seal of Texas] 1307 San Jacinto, 11th Floor
Houston, TX 77002

April 26, 2001

RE: Case No. 14-98-00789-CV

[USPS Meter Mark
Houston, APR 26'01]

Style: Larkin, Ward S.
v. Comp USA Inc and Johnson Michael

Please be advised that, on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

T.C. Case # 97-30752 Ed Wells, Clerk

Ward S. Larkin
15327 Pebble Bend Drive
Houston, TX 77068-1839

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

August 9, 2001

Ms. Leslie Ashby (Garcia)
Ashby & Whitmire
1415 Louisiana, Suite 3200
Houston, TX 77002

Mr. Ryan Chadwick
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Michael R. Hull
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, TX 77002

RE: Case Number 01-0501
Court of Appeals Number: 14-98-00789-CV
Trial Court Number: 97-30752

Style: WARD S. LARKIN
v.
COMPUSA, INC. and MICHAEL JOHNSON

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R. Hunter,
Deputy Clerk

cc: Mr. Ed Wells, Clerk
Mr. Charles Bacarisse
Mr. Ward Larkin

[SEAL] **THE SUPREME COURT OF TEXAS**
Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

September 27, 2001

Ms. Leslie Ashby (Garcia)
Ashby & Whitmire
1415 Louisiana, Suite 3200
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Mr. Ryan Chadwick
Jackson & Walker
1100 Louisiana, Suite 4200
Houston, TX 77002

Mr. Michael R. Hull
Harris County Attorney's Office
1019 Congress, 15th Floor
Houston, TX 77002

RE: Case Number 01-0501
Court of Appeals Number: 14-98-00789-CV
Trial Court Number: 97-30752

Style: WARD S. LARKIN
v.
COMPUSA, INC. and MICHAEL JOHNSON

Dear Counsel:

Today, the Supreme Court of Texas denied the motion for rehearing of the above-styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya Hunter
Tanya R. Hunter,
Deputy Clerk

cc: Mr. Ed Wells, Clerk
Mr. Charles Bacarisse
Mr. Ward Larkin

CAUSE NO. 97-30752

WARD S. LARKIN **Plaintiff**	§	**IN THE CIVIL DISTRICT COURT**
VS.	§	**OF HARRIS COUNTY, TEXAS**
CompUSA, INCORPORATED and MICHAEL JOHNSON **Defendant**	§	**133RD JUDICIAL DISTRICT**

ORDER

(Filed Mar. 31, 1998)

On this day came on to be considered Plaintiff's Motion for New Trial. After duly considering the same, the motion is hereby ~~GRANTED~~ [Denied].

IT IS THEREFORE ORDERED that ~~this cause is hereby set for trial on the ___ day of ___, 1998~~ [Plaintiff motion for New Trial is denied].

Signed on this the 15 day of June, 1998.

/s/ Lamar McCorkle
JUDGE PRESIDING

[Seal]

THE ATTORNEY GENERAL
OF TEXAS

May 11, 1988

JIM MATTOX
ATTORNEY GENERAL

Honorable David H. Cain
Texas House of Representatives
P.O. Box 2910
Austin, TX 78769

Opinion No. JM-900

Re: Whether the use of "abusive, indecent, profane or vulgar" language in a public place constitutes an immediate breach of the peace (RQ-1378)

Dear Representative Cain:

Section 42.01 of the Penal Code provides in part that

> (a) A person commits an offense if he intentionally or knowingly:
>
> (1) uses abusive, indecent, profane, or vulgar language in a public place, *and the language by its very utterance tends to incite an immediate breach of the peace*[.] (Emphasis added.)

Penal Code § 42.01(a)(1).

You ask the following questions:

> (1) Does uttering abusive, indecent, profane, or vulgar language in a public place constitute an immediate 'breach of the peace?'
>
> (2) How is 'breach of the peace' defined in relation to Article 42.01(a)(1)?

In order for this provision to withstand scrutiny under the broad guarantees for freedom of expression and due process of law in the United States Constitution, the utterances prohibited can *only* include "fighting words." *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). *See Gooding v. Wilson,* 405 U.S. 518 (1972) and *Acker v. Texas,* 430 U.S. 962 (1977). *See also* Attorney General Opinion MW-1 (1979).[1]

Whether particular words are "fighting words" is a matter of fact. *Chaplinksy, supra,* at 573.

> The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . Derisive and annoying words can be taken as coming within the purview of the statute . . . only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace.

See *Gooding v. Wilson, supra,* at 522, quoting with approval of the Supreme Court of New Hampshire, 18 A.2d 754, 758, 762 (1941). *See generally, Cohen v. California,* 403 U.S. 15, 20 (1971); *Bachellar v. Maryland,* 397 U.S. 564, 567 (1970); and *Gooding, supra.* The "line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn," *Speiser v. Randall,* 357 U.S. 513, 525 (1958).

Speech punishable under the Penal Code provision does not include language merely harsh and insulting,

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[1] This statute does not concern speech legally obscene under the standards provided by the United States Supreme Court in *Miller v. California,* 418 U.S. 915 (1973). *See Spears v. State,* 337 So.2d 977 (Fla. 1976).

see Gooding, supra at 525, and it should not include speech, actual or symbolic, that is only "inappropriate," "naughty," "disgusting," "repulsive," "tactless," "gross," or "appalling." Annot., 2 A.L.R.4th 1331. Conviction under a statute specifically a "breach of the peace" as an element of the offense must be based on jury instructions including an admonition that proof of "actual or threatened violence is essential." *Woods v. State*, 213 S.W.2d 685, 687 (Tex. Crim. App. 1948). In other words, anything short of the use of "fighting words" does not constitute a breach of the statute. *See Jimmerson v. State*, 561 S.W.2d 5 (Tex. Crim. App. 1978). Speech is protected against punishment unless "shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminello (sic) v. Chicago*, 337 U.S. 1, 4 (1949).

Finally, because the application of the statute may turn largely on the factual setting of the speech at issue, the test is whether, in a particular instance, an average person would be inured to respond by fighting. An average person is not someone who is overly sensitive or overly inured to the speech in question. *Cohen, supra* and *Houston v. Hill*, 482 U.S. ___, 96 L.Ed2d 398 (1987), quoting from a concurring opinion of Justice Powell in *Lewis v. New Orleans*, 415 U.S. 130, 135 (1974).

SUMMARY

Article 42.01(a)(1) of the Penal Code applies only to speech which as a matter of fact constitutes "fighting words." As a matter of law, the statute does not reach speech that merely causes public inconvenience, annoyance, or unrest.

"Fighting words" are words which would likely cause an average addressee to fight. An "average addressee" is not someone either overly sensitive or overly inured to the speech in question.

Very truly yours,
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